IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,
v.

PENSION BENEFIT GUARANTY CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF GENERAL MOTORS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS AND BRIEF *AMICUS CURIAE* OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE RESPONDENTS

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MOTION OF GENERAL MOTORS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

To the Honorable Chief Justice and Associate Justices of the United States:

General Motors Corporation respectfully moves this Court, pursuant to Supreme Court Rule 42(3), for leave to file the accompanying brief in this case as *amicus curiae* in support of the Respondents and urging affirmance of the decision of the Court of Appeals for the Seventh Circuit. In support of this motion, General Motors shows as follows:

1. This motion is necessitated by the refusal of the Petitioner to consent to the filing of a brief by General Motors Corporation (General Motors) as *amicus curiae.*

2. General Motors, a Delaware corporation with its principal offices located in Detroit, Michigan, is engaged in the automotive manufacturing industry. General Motors sponsors defined benefit pension plans for employees of its United States operations. These plans have approximately 841,000 participants. The present value of the liability accrued under these plans for benefits which are nonforfeitable without regard to plan termination, an amount well in excess of guaranteed benefits, is approximately $12,098,000,000. This amount exceeds the value of plan assets. The present value of all accrued benefits which would become nonforfeitable on plan termination and which General Motors could become contractually liable to pay is approximately $16,120,000,000.

3. Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), each of these plans contained a provision limiting the liability of General Motors under the plans to the

obligation to make the contributions specified in the plan documents. Upon the enactment of ERISA, these plans were duly amended to modify this limitation of liability provision to the extent required by Title IV of ERISA. However, the limitation of liability provisions remain in effect, as so modified.

4. Fundamental to the Petitioner's case is the proposition that sponsoring employer limitation of liability clauses which prevent participants from recovering unfunded benefits from the employers, themselves, in some way render benefits "forfeitable." Because the concept of nonforfeitability is used both in Title I of ERISA as well as in Title IV, Court determination that employer limitation of liability clauses render benefits forfeitable would result in provisions such as those contained in General Motors' plans being proscribed by Title I of ERISA. Such a holding is of no concern to Petitioner, or *amicus curiae*, Concord Control, Inc., because they terminated their plans prior to the effective date of ERISA's minimum vesting standard provisions. Such a determination, however, would be of vital concern to General Motors as well as to the thousands of other sponsoring employers who have chosen to continue their plans under the assumption that their limitation of liability provisions remain valid so long as they are consistent with potential PBGC recoverability.

5. No employer who has elected to continue to maintain its plans is involved as a party to this case. Consequently, the adverse impact that a ruling in Petitioner's favor would have upon such employers will not be presented to this Court unless our request to file the accompanying brief is granted.

WHEREFORE, it is respectfully moved and requested that General Motors Corporation be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE RESPONDENTS

General Motors Corporation (General Motors) hereby submits this brief in Case No. 78-1557 urging

affirmance of the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on January 23, 1979.

INTEREST OF *AMICUS CURIAE*

A statement describing the interest of General Motors as a sponsoring employer of a continuing pension plan is set forth in the preceding motion requesting leave to file this brief *amicus curiae.*

SUMMARY OF ARGUMENT

Critical to the resolution of this case is the question of whether a plan provision which purports to limit a participant's claim for benefits to the assets of a defined benefit plan renders otherwise nonforfeitable or vested benefits forfeitable.

Because the minimum vesting standards of Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (Supp. V 1975) (hereinafter "ERISA") require that certain benefits be nonforfeitable, a holding that such employer limitation of liability clauses render benefits forfeitable would require all plans which currently contain such clauses to remove them to avoid a violation of Title I.

Removal of limitation of liability clauses would expose employers who currently maintain plans to a potential contractual liability for benefits limited only by the assets of those employers. Such an extreme result would be contrary to the intentions of Congress in enacting ERISA.

ARGUMENT

I. Introduction.

Petitioner, Nachman Corporation, is an Illinois corporation which, pursuant to a collective bargaining agreement with Respondent, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, established and maintained a pension plan for eligible bargaining unit employees (hereinafter referred to as the "Plan"). Pursuant to this Plan, Petitioner, as the Plan's sponsoring employer, agreed to make certain contributions to a trust fund which financed the Plan's retirement benefits. Petitioner retained the right to terminate the Plan upon 90 days' notice after expiration of the aforementioned collective bargaining agreement. The Plan contained a provision limiting the liability of Petitioner in the event of a Plan termination to any contributions which were accrued, but unpaid, as of the Plan termination date.[1]

ERISA was enacted by Congress in 1974. Title IV of ERISA, entitled "Plan Termination Insurance," created the Pension Benefit Guaranty Corporation (hereinafter "PBGC") for the purpose of insuring or guaranteeing certain "nonforfeitable" employee retirement benefits.[2] This insurance was to be funded by premiums paid by pension plan administrators,[3] as well as by the right of the PBGC to recover up to thirty percent of a sponsoring employer's net worth

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[1] Article V, § 3 of the Plan, Appendix 24.

[2] ERISA § 4022, 29 U.S.C. § 1322 (Supp. V 1975).

[3] ERISA § 4007, 29 U.S.C. § 1307 (Supp. V 1975).

for payments made by the PBGC due to the termination of the sponsoring employer's pension plan without sufficient plan assets to pay all guaranteed benefits.[4] Title IV of ERISA became effective, generally, on September 2, 1974.[5]

Petitioner announced on October 1, 1975 that it was terminating its Plan on December 31, 1975. At the time the Plan terminated certain benefits which were fully vested under the Plan, in that the participants had satisfied the Plan's service and age requirements, were not yet fully funded. The instant action was brought by Petitioner in order to challenge the PBGC interpretation of Title IV that under the foregoing facts the PBGC guarantees the Plan's vested, but unfunded, benefits. Petitioner claims that because the participants had no recourse against it for unfunded benefits due to the limitation of liability clause, the unfunded benefits were not "nonforfeitable" and, thus, not guaranteed under § 4022(a) of ERISA, 29 U.S.C. § 1322(a) (Supp. V 1975).

The district court accepted Petitioner's assertion that because the minimum vesting standards provision of ERISA [6] never became applicable to the Plan, the limitation of liability provision was valid and rendered the benefits in question forfeitable. The district court, therefore, granted Petitioner's motion for summary judgment and denied those of the Respondents. The district court rationale implies, therefore, that

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[4] ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975).

[5] ERISA § 4082, 29 U.S.C. § 1381 (Supp. V 1975).

[6] ERISA § 203, 29 U.S.C. § 1053(a) (Supp. V 1975); I.R.C. § 411.

the limitation of liability provision would be rendered void subsequent to the effective date of the minimum vesting standard provisions of ERISA. The Seventh Circuit, in reversing the district court, held that because Title IV became effective in 1974, prior to the termination of the Plan, its benefit guarantee and employer liability provisions [7] superseded the Plan's provision for absolute exclusion of the sponsoring employer's liability for unfunded benefits. It further held that benefits are not rendered forfeitable or not "nonforfeitable" as that term is used in the benefit guarantee and minimum vesting provisions of ERISA,[8] merely because they are not collectible from the sponsoring employer. Thus, the Seventh Circuit determined that the benefits in question were nonforfeitable with respect to the Plan and, reversed the holding of the district court. The case is currently on review pursuant to the Court's issue of a writ of certiorari.

II. A Determination by This Court that Provisions Which Limit Benefit Claims to Plan Assets Thereby Render Those Benefits Forfeitable, Would Expose Employers Maintaining Plans After January 1, 1976 to Substantial Potential Liability.

A critical issue in this case is whether or not a provision which limits a participant's claim for benefits to the assets of a defined benefit plan renders otherwise nonforfeitable benefits forfeitable. The Nachman Plan expressly provided that:

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[7] ERISA §§ 4022 and 4062, 29 U.S.C. §§ 1322 and 1362 (Supp. V 1975), respectively.

[8] ERISA §§ 4022 and 203, 29 U.S.C. §§ 1362 and 1053; I.R.C. § 411.

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Article V, § 3 of the Plan, Appendix 24.

If because of this provision, no benefits under the Plan are viewed as being vested, the Petitioner has no liability to the PBGC. Pursuant to ERISA Section 4022, 29 U.S.C. § 1322 (Supp. V 1975), only certain nonforfeitable benefits are guaranteed by the PBGC. The liability imposed by Title IV of ERISA upon an employer who terminates its plan is limited to the lesser of the current value of unfunded benefits which are guaranteed under Title IV or thirty percent of the employer's net worth. ERISA Section 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975). Thus, it is clear that benefits which are forfeitable on the date of a Plan's termination cannot cause Title IV liability to attach to an employer. If, as was the case prior to the enactment of ERISA, an employer could create a plan which provided for no nonforfeitable benefits, Title IV would neither impose liability on the employer nor protect the plan participants. Congress foreclosed such an evasion of the regulatory scheme of Title IV by enacting minimum vesting, participation and benefit accrual standards under Titles I and II. ERISA §§ 202-204, 29 U.S.C. §§ 1052-1054 (Supp. V 1975); I.R.C. §§ 410-411. These minimum standards did not become effective

until plan years beginning after December 31, 1975,[9] while the plan termination insurance provisions of Title IV became effective upon the enactment of ERISA on September 2, 1974, with certain protection being afforded to plan participants retroactively to July 1, 1974.[10] During this interim period, if a plan which did not meet the minimum vesting standards established by ERISA terminated,[11] the protection of the participants and liability of the employer were limited to benefits vested under the terms of the plan.

Once Titles I and II of ERISA became effective, plans which continued in force were required to amend their provisions to bring them in compliance with ERISA's minimum standards. The minimum vesting standards under ERISA require, with certain enumerated exceptions,[12] every pension plan to pro-

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[9] ERISA § 211, 29 U.S.C. § 1061 (Supp. V 1975).

[10] ERISA § 4082, 29 U.S.C. § 1381 (Supp. V 1975).

[11] The Nachman Plan, for example, does not comply with the minimum vesting standards under ERISA in that a participant under that plan was not entitled to a deferred vested benefit until he had completed fifteen years of service. Article VII, § 3 at Appendix 28. This vesting schedule does not meet any one of the three alternative minimum schedules set forth in ERISA Section 203(a)(2), 29 U.S.C. § 1053(a)(2) (Supp. V 1975); I.R.C. § 411(a)(2).

[12] Permitted forfeitures include forfeiture upon death of a participant, suspension of payment of benefits during a period in time in which the participant is reemployed, changes in benefits resulting from retroactively effective plan amendment otherwise in accord with the statutes, and benefits forfeited by participants who withdraw mandatory contributions prior to the time they are fifty percent vested

vide that an employee's right to a retirement benefit be nonforfeitable upon the attainment of normal retirement age and upon completion of a specified number of years of service which does not exceed one of three permissible vesting schedules set forth in the statute. Thus, for example, a plan which previously provided that a participant had no right to receive a vested benefit prior to his completion of fifteen years of service and attainment of age 45 would not be in compliance with Section 203 and would be required to be amended to provide, say, that a participant's right to a benefit became nonforfeitable upon his completion of ten years of service. ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2) (Supp V 1975). A holding by this Court that the provision of the Nachman Plan which limits a participant's claim for benefits to the assets of the Plan thereby renders an otherwise nonforfeitable benefit forfeitable, would require all employers which currently maintain plans to eliminate such provisions from their plans because such provisions would be inconsistent with ERISA's minimum vesting standards. The defined benefit plans of many employers, including General Motors, currently contain such provisions.[13]

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in their accrued benefits. ERISA Section 203(a)(3), 29 U.S.C. § 1053(a)(3) (Supp. V 1975); I.R.C. § 411(a)(3).

[13] For example, Article V, Section 3(b) of the General Motors Hourly-Rate Employes Pension Plan provides:

> The pension benefits and supplements of the Plan shall be only such as can be provided by the assets of the pension fund or by any insured fund and there shall be no liability or obligation on the part of the Corporation to make any further contributions to the trustee or insurance company in event of termination of the Plan.

Provisions which expressly limit the benefit claims of participants to the assets of a defined benefit plan are included in order to foreclose creation of a contractual right under which employees could assert a claim against their employer for the payment of retirement benefits which are neither funded nor guaranteed by the Pension Benefit Guaranty Corporation. The modern judicial trend, evidenced by decisions throughout the United States, is that employers who create employee retirement, insurance or other welfare benefit plans, and communicate those plans to their employees, have made an offer which employees are deemed to have accepted through their continued rendering of services to the employer. Employee acceptance of this offer is held to create an enforceable unilateral contract.

Hoefel v. *Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied sub nom., Atlas Tack* v. *Mahoney,* 440 U.S. 913 (1979), is a recent decision reflecting this judicial approach. In *Hoefel*, former employees brought an action to collect pension benefits allegedly due them from their previous employer. The employer, Atlas, had created a pension plan calling for it to make certain contributions. Atlas reserved the right to alter or terminate the plan, but it neither limited its liability upon plan termination to contributions already made nor expressly told its employees that discontinuance of the plan could cut off

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> No liability for the payment of pension benefits or supplements under the Plan shall be imposed upon the Corporation, the Officers, Directors or Stockholders of the Corporation, except as otherwise may be required by the Employee Retirement Income Security Act of 1974.

pensions already earned. Subsequently, due to financial difficulties, Atlas did terminate the plan and ceased making pension payments to the plaintiffs. The district court concluded both that plaintiffs had reasonably believed that upon qualifying under the plan, they would receive a lifetime pension, and that they had continued to render services to Atlas in reliance upon this promise of such a pension. Consequently, the court determined that Atlas' offer of a pension created binding unilateral contractual rights when employees, such as plaintiffs, qualified for a pension by rendering the requisite years of service. The district court, thus, issued a judgment for the plaintiffs which was later affirmed by the First Circuit. This Court denied certiorari.[14]

[14] Many other decisions hold that employer creation and communication of employee benefit plans constitute an offer which employees accept through their continued services, and whose acceptance gives rise to a contractual right to the benefit. *See, e.g., Matter of Erie Lackawanna Ry. Co.* 548 F.2d 621 (6th Cir. 1977); *Rochester Corporation* v. *Rochester,* 450 F.2d 621 (4th Cir. 1971); *Hurd* v. *Illinois Bell Telephone Company,* 234 F.2d 942 (7th Cir. 1956); *Hurd* v. *Hutnick,* 419 F. Supp. 630 (D.N.J. 1976); *Miller* v. *Dictaphone Corporation,* 334 F.Supp. 840 (D.Ore. 1971); *Hunter* v. *Sparling,* 87 Cal. App. 2d 711, 197 P.2d 807 (1948); *Tilbert* v. *Eagle Lock Co.,* 116 Conn. 357, 165 A. 205 (1933); *Delaware Trust Co.* v. *Delaware Trust Co.,* 43 Del. Ch. 186, 222 A.2d 320 (1966); *Ehrle* v. *Bank Building & Equipment Corp. of America,* 530 S.W.2d 482 (Mo. Ct. App. 1975); *Psutka* v. *Michigan Alkali,* 274 Mich. 318, 264 N.W. 385 (1936); *Stopford* v. *Boonton Molding Company,* 56 N.J. 169, 265 A.2d 657 (1970); *Sheehy* v. *Seilon, Inc.,* 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *McHorse* v. *Portland General Electric Company,* 268 Or. 357, 521 P.2d 315 (1974); *Levitt* v. *Billy Penn Corporation,* 219 Pa. Super. Ct. 499, 283 A.2d 873 (1971); *Weesner* v. *Electric Power Board of Chattanooga,* 48 Tenn. App. 178, 344 S.W.2d 766 (1961); *Auerbach's Inc.* v. *Kimball,* 572 P.2d 376 (Utah 1977); *Schlosser* v. *Allis-Chalmers Corp.,* 86 Wis.2d 226, 271 N.W.2d 879 (1978); and *Parsley* v. *Wyoming Automative Company,* 395 P.2d 291 (Wyo. 1964).

To prevent an unlimited contractual liability from arising, employers have expressly limited their offer of retirement benefits to those benefits which can be provided from the assets of the plan and to those which are guaranteed by the Pension Benefit Guaranty Corporation. Requiring the excision of such provisions from retirement plans could result in substantially increased employer liability on plan termination. Indeed, in many instances this liability could exceed the thirty percent of net worth limitation which Congress placed on the Pension Benefit Guaranty Corporation's right to seek reimbursement from an employer terminating its plan. This increased liability arises because all benefits vested under a terminated plan are not guaranteed by the Pension Benefit Guaranty Corporation. It fully guarantees only nonforfeitable benefits (other than benefits becoming nonforfeitable solely by reason of plan termination) which have been in effect for five years, and do not exceed a specified dollar amount.[15] Benefit increases occurring within five years of plan ter-

[15] ERISA Section 4022(b)(3), 29 U.S.C. § 1322(b)(3) (Supp. V 1975), provides that guaranteed benefits may not exceed the smaller of a participant's average monthly gross income from his employer during the five consecutive calendar year periods in which such income was the highest or $750 adjusted for increases in a contribution and benefit base under the Social Security Act occurring since 1974.

mination become guaranteed at the rate of twenty percent of the increase, or if greater, $20 for each year in which the benefit increase has been in effect. Most significantly, Internal Revenue Code Section 411(d)(3) requires that a qualified plan provide that the rights of all affected participants to receive their accrued benefits become nonforfeitable upon the plan's termination or partial termination. Thus, all benefits of all participants in a terminated plan are nonforfeitable, but only a portion of these benefits are guaranteed by the Pension Benefit Guaranty Corporation. If clauses which limit a participant's claim to benefits to the assets of a plan are required to be deleted, employers will have a potential contractual liability for these nonguaranteed but nonforeitable benefits. The magnitude of this potential liability is substantial. For example, under General Motors plans, the present value of the accrued liability for benefits which are nonforfeitable without regard to plan termination, an amount greater than the value of guaranteed benefits, is approximately $12,098,000,000. This exceeds the value of plan assets. The present value of accrued benefits which are currently forfeitable but which would become nonforfeitable on plan termination and which General Motors could become contractually liable to pay is approximately $16,120,000,000.

The problems which would flow from a construction of ERISA under which an employer limitation of liability clause was viewed as impairing the nonforfeitability of benefits was apparently perceived by the Treasury Department in promulgating regulation Section 1.411(a)-4(a); 26 C.F.R. § 1.411(a)-4(a). This regulation provides in relevant part:

> Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. *However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation.* (Emphasis added.)

The first sentence can be interpreted as merely proscribing a limitation of liability provision which does not acknowledge the recourse to the PBGC which plan participants now have for satisfaction of their nonforfeitable benefits. Thus, the second sentence appears to embrace the view urged here that an employer limitation of liability provision does not cause an otherwise nonforfeitable benefit to become forfeitable. If, on the other hand, the regulation is attempting to distinguish a condtioning of benefits on the sufficiency of plan assets from a limiting of the recourse of plan participants for payment of those benefits to plan assets, it is elevating form over substance and is internally inconsistent. In practice, the form of an employer limitation of liability provision matters not one wit. The effect of either type of provision on plan participants is the same—their claim for benefits may be satisfied only from the assets of the plan and the guarantees of the Pension Benefit Guaranty Corporation.

III. An Interpretation of ERISA Creating Unlimited Sponsoring Employer Liability Would Be Contrary To Congressional Intent.

Congress fully recognized that the American retirement system is largely comprised of private pension programs voluntarily created and maintained by sponsoring employers as a benefit for their employees. While Congress, through required vesting schedules, funding requirements and benefit guarantees sought, on the one hand, to insure that participants would actually receive the benefits upon which they relied, it recognized, on the other hand, that imposition of excessively onerous burdens upon sponsoring employers, as a matter of economic reality, would operate both to discourage creation of new plans as well as to encourage the termination of existing plans. This congressional intention not to undermine the viability of the private pension system is underscored by the following statement of Representative Ullman, now Chairman of the House Ways and Means Committee during debate on the Conference Report:

> I want to emphasize that these new [ERISA] requirements have been carefully designed to provide adequate protection for employees and at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation [ERISA] is designed.

ERISA Leg. Hist., Vol. III at 4673. *Accord*, ERISA Leg. Hist., Vol. I at 599-600, S. Rep. No. 92-127, S. Comm. on Labor and Public Welfare Report on S. 4, and ERISA Leg. Hist., Vol. II at 1776, containing a comment of Senator Williams during early Senate debate on the proposed legislation. All citations to ERISA legislative history shall be to the separately bound legislative history: S. Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976) [hereinafter cited as "ERISA Leg. Hist."]

Similarly, during Senate debate on the Conference Report, Senator Nelson discussed the delicate balance Congress struck between employer and employee interests when enacting ERISA:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

ERISA Leg.Hist., Vol. III at 4800.

Further congressional concern that excessively stringent pension plan requirements would retard the

the growth of the private pension system is evidenced by the following analysis by the Senate Committee on Finance regarding the need to balance employer costs with desired reform:

> At the same time, the committee is aware that under our voluntary pension system, the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, in the case of those requirements which add to the cost of financing retirement plans, the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits.

ERISA Leg. Hist., Vol. I at 1086, S. Rep. No. 93-383 on S. 1179. *Accord*, ERISA Leg. Hist., Vol. II at 2348, House Committee on Education and Labor Report on H.R. 2.

Any construction of ERISA which results in the imposition of unlimited employer liability flies in the face of this congressional concern and the structure of the statute. Indeed in areas where Congress decided to impose liability, it did so in a measured and limited manner. This is illustrated by the following analysis which is contained in both the Senate and House reports:

> Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee has concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.
>
> Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.[16]

ERISA Leg. Hist., Vol. I at 612, S. Rep. No. 93-127: Report of Committee on Labor and Public Welfare on S. 4; ERISA Leg. Hist., Vol. II at 2363, H. Rep. No. 93-533, House Committee on Education and Labor Report on H.R. 2.

Ultimately, congressional deliberations and concern regarding the continued viability of the nation's voluntary, private pension system and the impact unlimited employer liability would have thereon, cul-

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[16] Congressional apprehension regarding the level of employer liability is further reflected by its ultimate enactment of the thirty percent of net worth ceiling prescribed by ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975). The thirty percent figure was adopted after conferees from both houses received the following recommendation from the administration:

> The Administration recommends that employer liability be limited to 30 percent of an employer's net worth (determined as fair market value on a going concern basis) 120 days prior to the date of plan termination.

ERISA Leg. Hist., Vol. III at 5096.

minated in the enactment of ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975), the limitation of employer liability provision:

> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—
>
> (1) the excess of—
>
> (A) the current value of the plan's benefits guaranteed under this title on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

This limitation of liability provision represents a microcosm of Congress' profound efforts to balance the sometimes competing efforts of employer and employee because it is a product not only of legislative efforts to *limit* employer liability, but also of legislative desires to *create* employer liability. This latter objective arose from congressional fear that omission of a provision creating employer liability could operate to encourage employers to terminate pension plans in order to transfer their liability to the PBGC. ERISA Leg. Hist., Vol. II at 1724, Analysis of Amendment 496 to S. 4; and ERISA Leg. Hist., Vol. II at 2363, *supra* at 17. Consideration of both of these dimensions of congressional concern was well

articulated in the following statement of Representative Erlenborn during House debate on H.R. 2:

> The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions. In this way the employer has no obligation under the law for the total amount of the promised pension benefits. It is because of this device that we have been able to build the large private pension system that exists today. I can say very confidently that if the law had required the employer to guarantee the payment of the pension 15 or 20 years ago when that system began to grow, it would not have grown in the proportions that it has up until the present time.

ERISA Leg. Hist., Vol. II at 3388-3389.

Congressional anxiety that failure to enact a provision *establishing* employer liability would permit employers to avoid all liability, by simply shifting it to the PBGC through plan terminations, dispels any notion that Congress believed ERISA was outlawing all employer limitation of liability clauses. As previously discussed, if employers were no longer to be able to limit or exclude their liability through such

clauses, they would have unlimited contractual liability to plan participants. The presence of such contractual liability would have been sufficient to dissuade employers from terminating plans simply to take advantage of plan termination insurance. Thus, one can only conclude that this aspect of congressional apprehension reflects legislative understanding that employer limitation of liability provisions were not to be vitiated by ERISA.

Congressional intent that employers not be burdened by the yoke of unlimited liability, aside from being evidenced by its failure to adopt any language clearly outlawing such a provision, and by its adoption of affirmative language expressly limiting employer liability, is highlighted by the entire legislative scheme which Congress selected—an elaborate government insurance program calling for premium payments and limited recoverability against employers. Congress simply could have declared all employer limitation of liability clauses void or could have guaranteed benefits, only after an employer's net worth had been exhausted.

Construing ERISA to provide that the inability to *collect* benefits from an employer due to a limitation of liability clause renders those benefits forfeitable and, thus, of necessity, neither guaranteed nor "vested" could undermine the plan termination insurance Congress took such pains to establish. For, if uncollectability of the benefit from the employer due to the allegedly proscribed clause renders the benefit forfeitable, should not the similar uncollectability of the benefit caused by the bankruptcy of the employer render the benefit equally forfeitable and, thus,

not guaranteed? Certainly there is no *practical* basis for distinction.

The Pension Benefit Guaranty Corporation's applicable regulation which rules that the *collectability* of the benefit from the employer has nothing to do with the forfeitability of the benefit effectuates congressional intent. This straightforward regulation which we submit is entitled to judicial deference provides as follows:

> (a) For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

29 C.F.R. § 2605.6(a).

IV. Conclusion.

The decision of the Seventh Circuit in *Nachman* that the collectability of a plan benefit from the sponsoring employer has no significance with respect to the nonforfeitability of the benefit and, thus, impacts neither whether the benefit is guaranteed under Title IV of ERISA nor vested under Title I of ERISA, reflects Congress' intent when enacting the statute. Reversal of this decision in a manner which could lead to the legal conclusion that provisions limiting employer liability cause benefits to become non-

forfeitable in violation of ERISA § 203 could expose employers to potential unlimited liability and, hence, threaten the viability of the nation's private pension system.

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit is correct and should be affirmed.

Respectfully submitted,

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